

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Michael J. Lindell and) COURT FILE
MyPillow, Inc.,) NO. 22-CV-2290 (ECT/ECW)
)
)
Plaintiffs,)
)
vs.)
)
United States of America; Merrick)
Garland, *in his official capacity*)
as Attorney General of the United)
States; The United States Attorney)
for the District of Minnesota; and)
Christopher Wray, *in his official*)
capacity as Director of the)
Federal Bureau of Investigation,) Courtroom 3B
Defendants.) Wed., October 19, 2022
) St. Paul, Minnesota
) 10:00 A.M.

HEARING ON**PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER
AND FOR RETURN OF PROPERTY PURSUANT TO FED.R.CRIM.P. 41(g)**

**BEFORE THE HONORABLE ERIC C. TOSTRUD
UNITED STATES DISTRICT JUDGE**

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Official Court Reporter - United States District Court
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* * * *

1 (10:00 a.m.)

2 **P R O C E E D I N G S**

3 **IN OPEN COURT**

4 THE COURT: Good morning, everyone. Please be
5 seated.

6 This is Michael Lindell and others versus United
7 States of America and others, Civil File Number 22-2290.

8 Let me invite appearances from counsel, starting with the
9 plaintiffs.

10 MR. PARKER: Your Honor, Andrew Parker
11 representing Michael Lindell and MyPillow, Inc.

12 THE COURT: Good morning, Mr. Parker.

13 MR. PARKER: Good morning, Your Honor.

14 THE COURT: And how about for the defendants?

15 MR. JACOBSON: Good morning, Your Honor. Jonathan
16 Jacobson for the United States.

17 MR. TEITELBAUM: Good morning, Your Honor. Aaron
18 Teitelbaum for the United States.

19 MR. BAUNE: Craig Baune for the United States.

20 MS. VOSS: Good morning, Your Honor. Ana Voss.

21 THE COURT: Good morning.

22 All right. Here's how I'd like to handle things
23 today. I've allotted up to two hours for the hearing today.
24 We could divide that with one hour for each motion, or if
25 you all want to take a little extra time with one motion or

1 the other, that's fine. You don't -- please don't feel
2 compelled to take all of your time. You're welcome to take
3 less if you're so inclined.

4 I thought we would start with the motion seeking
5 access to the search warrant materials and then move to the
6 motion for return of property and I suppose other relief.

7 So, Mr. Parker, let's hear from you first, since
8 it's your motion, on the request for access to the search
9 warrant materials.

10 I should say I do have questions. I'll try to
11 insert them where they seem to fit in the outline of your
12 argument.

13 MR. PARKER: Counsel, Your Honor, thank you for
14 your time.

15 Mike Lindell seeks access to the affidavit that
16 resulted in a search warrant in this case. Our position as
17 it relates to public access is that the search warrant, or
18 the affidavit, may remain sealed to others, but because he
19 is the subject of the warrant, he has particular need and
20 interest and right to review of the affidavit.

21 This was specifically discussed by Judge Noel in
22 the **Up North Plastics** case in this district. Prior to that
23 similar rules had been issued by a number of courts across
24 the country.

25 It's important to note, Your Honor, that Judge

1 Noel, of course, a magistrate judge for some 30 years on
2 this bench and very highly respected, issued that order in
3 1996, and since that time, Your Honor, that ruling has been
4 cited 23 separate times by different courts.

5 THE COURT: Not always favorably.

6 MR. PARKER: Not always favorably, but the vast,
7 vast majority favorably.

8 THE COURT: Let's sort of skip to what matters
9 about that ruling or what I think matters about that ruling
10 and you can tell me if you disagree.

11 Judge Noel finds a Fourth Amendment right, but he
12 doesn't stop there. He continues on to analyze the problem
13 in essentially the same way as I understand the First
14 Amendment and common-law access rights are typically
15 analyzed. In other words, he looks to see what the
16 Government interest is and he asks whether the Government
17 has a compelling interest. So whether a Fourth Amendment
18 right exists or not, you've still got to answer that second
19 prong, correct?

20 MR. PARKER: That's correct, Your Honor.

21 THE COURT: And it's no different here in this
22 case, even if I were to accept it, that reasoning, than it
23 is in the First Amendment or common-law context?

24 MR. PARKER: No, we believe that it is different
25 and it goes to the point I made at the top, which is we're

1 dealing here not with access of the affidavit to the public.
2 We're dealing with the subject of the warrant. And if this
3 Court were to allow the affidavit to be seen by the subject
4 of the warrant under a protective order, that that --

5 THE COURT: But how is the Government's interest
6 showing different in the Fourth Amendment context than the
7 First Amendment context?

8 MR. PARKER: Well, that interest is similar, but
9 the balance of the governmental interest versus the interest
10 of the party seeking the affidavit is different, because we
11 have a different party that is seeking the affidavit.

12 THE COURT: Okay. Now that's -- okay. Where do I
13 go to find that? What case says that?

14 MR. PARKER: There is no case in this district and
15 I think the only case would be the Fourth Circuit case in
16 **Oliver** that may refer to it, but it is -- regardless, there
17 is no doubt that it is a difference when you're talking
18 about public-wide broad access and when you're talking about
19 an individual and only one individual. And again, this
20 Court can issue a protective order that prevents that
21 individual from sharing it with anyone just as the Court
22 does in a number of other situations.

23 But going to the Government's compelling interest,
24 we believe they don't meet that here as well because of the
25 public nature of this investigation as has already been

1 released and is out in the public. So unlike some other
2 cases, this case doesn't have that sort of protection where
3 if you provide the information, it'll be the first anybody
4 sees it. In this case the warrant itself, which is unsealed
5 and has been seen by many, has a whole list of individuals
6 who are involved as, quote-unquote, co-conspirators already
7 listed in the warrant. The violations s that are being
8 alleged are already listed in the warrant. The manner in
9 which the warrant was executed was done in a very public
10 manner, was widely described and discussed in the media.
11 Prior to the execution of the warrant, the coverage
12 related to -- and since the execution of the warrant -- the
13 coverage related to the Colorado investigation has been
14 widely covered with a broad range of information that has
15 been provided.

16 THE COURT: So I thought the Eighth Circuit
17 addressed that argument in the **Gunn** case, or one of the two
18 **Gunn** cases, and said essentially that though there the
19 investigation regarding the defense contractors was fairly
20 widely known and relatively or comparatively public to, say,
21 an investigation of a single felon in possession of a
22 firearm or a single drug dealer, that it didn't really make
23 a difference there.

24 Am I misreading that or are you distinguishing
25 this case?

1 MR. PARKER: Yeah. I think it's much broader in
2 this case than it was in **Gunn**. It's much more specific in
3 this case than it was in **Gunn**. And again, the **Gunn** case was
4 dealing with public media access to information, whereas
5 this motion is dealing simply with the subject of the
6 warrant. And I think that Judge Noel recognized that. Yes,
7 it's true that he recognized that the governmental interest
8 test, if you will, and the least intrusive means test, the
9 two prongs that are required for the Government to
10 establish, apply in this situation.

16 | Are you right or am I right?

1 governmental interest is different than the broad public
2 access of the First Amendment covered under **Gunn**. So it is
3 a different analysis than it is under **Gunn**.

4 The primary --

5 THE COURT: If I look at the -- sorry, Mr. Parker.
6 If I look at the string cite that's at footnote 2 --

7 MR. PARKER: Yes.

8 THE COURT: -- at page 4 of your brief where
9 you've got the Fourth Circuit case **Oliver** cited and those
10 other cases, I haven't looked at all those cases yet. I've
11 looked at a couple of them. But if I look at all those
12 cases, will I find cases in there that authorize a release
13 of a warrant only to the person that is the subject of the
14 warrant; in other words, that do what you're asking me to do
15 here?

16 MR. PARKER: Yes. If you look at those cases -- I
17 can't remember which of the four, but I believe one of them
18 did. And again, Your Honor, the application in those cases
19 all resulted in the release of the affidavit.

20 THE COURT: But you know what I'm asking, just --

21 MR. PARKER: Yes, in terms --

22 THE COURT: And you believe that one of them did.

23 MR. PARKER: I cannot -- I cannot specifically
24 identify as I stand here.

25 THE COURT: Okay. Well, I'll take a look at them.

1 Thank you.

2 MR. PARKER: Your Honor, it's interesting that in
3 our local rules -- I think it's 49.1 -- that the sealing of
4 documents and the type of documents that get sealed and
5 protected are listed, and I found it interesting that
6 affidavits for warrants are not listed there. And in fact,
7 the court, this court, has ruled that routinely affidavits
8 of warrants are not sealed. So it is not the presumption
9 that the affidavits are sealed and protected from both
10 public access, but certainly from the subject of the
11 warrant. The opposite is the case. And so the burden is
12 certainly on the Government to come forward with compelling
13 governmental interest, and simply saying, "Well, we have an
14 ongoing criminal investigation" is insufficient. As the
15 court found, there needs to be specific detailed, factual
16 evidence in the record that the court can review and make a
17 determination based upon and that the appellate court can
18 then have the ability to review. We don't have that in this
19 record.

20 THE COURT: They've offered to give me the
21 records under -- or *in camera*. You're suggesting I should
22 take them up on that.

23 MR. PARKER: Well, you definitely should take them
24 up on it. We believe we have a right to see that
25 information confidentially and under a protective order in

1 order to weigh in in terms of our view as it relates to
2 that. In certain respects generally that should be the
3 case, but in this case in particular with the public nature
4 of the case and the warrant that is already open and
5 identifies the specific alleged violations, identifies the
6 individuals that are involved and being investigated.

7 Because of that, we believe this case doesn't meet the
8 compelling interest/least intrusive means standard.

9 It raises the question, Your Honor, I think, as
10 well: There is no indicia in this case that Mr. Lindell is
11 a danger. There is no indicia in this case that he has
12 destroyed documents or would destroy any evidence or data.
13 A subpoena would have sufficed in this case. There was one
14 served at the same time. The reason for this warrant being
15 used in the way that the Government decided to use it puts
16 them at risk of having to disclose the affidavit, and that
17 was a choice that the Government made, but it was not needed
18 in this case and certainly doesn't meet the least intrusive
19 means standard. Whether redaction in this case would meet
20 that standard through a review, we really don't have the
21 ability to say because we don't have the information.

22 THE COURT: When I read that argument, I mean,
23 there's sort of two pieces to that, but the thing that jumps
24 to mind is by making that argument, it strikes me that
25 you're suggesting that Mr. Lindell and his company would

1 have gone along with the subpoena.

2 MR. PARKER: Yes, and we have --

3 THE COURT: No objections, no nothing.

4 MR. PARKER: Well, we would have -- we may have
5 objected depending on what the subpoena said and how it came
6 forth, and then the subpoena could have been challenged in
7 court as it normally would be and what should be provided
8 would be provided and there would be a process for providing
9 that information. We'll get to that on the other issue
10 before the Court today as it relates to what the protocols
11 and the safeguards should have been in place as it relates
12 to a warrant and would certainly have been in place as it
13 relates to a subpoena and the potential challenge that could
14 have been made.

15 That's all I have, Your Honor.

16 THE COURT: Thank you, Mr. Parker.

17 Counsel?

18 MR. JACOBSON: Good morning, Your Honor.

19 THE COURT: Good morning.

20 MR. JACOBSON: Your Honor, I think you hit on some
21 of the key points that I would make today, which is really
22 that **Gunn I** and **Gunn II** control the outcome here, just as
23 they controlled the outcome yesterday when we were
24 litigating the issue of whether the newspaper had an
25 entitlement to a public release of the affidavit and the

1 search warrant materials. At the end of the day, there is
2 no public entitlement to search warrant materials in the
3 midst of an ongoing federal criminal investigation where
4 privacy, reputational, and due process interests of
5 disinterested third parties, or third parties who are not
6 here before the Court, are at stake.

7 **Gunn** recognized a First Amendment right to search
8 warrant materials. There's no doubt about that and we're
9 not hiding from that. But what **Gunn** gave with one hand it
10 took back with the other by saying not during the
11 investigation, not during the investigation, and that's the
12 key point here today that I want to highlight for Your
13 Honor.

14 The notion that we're here sort of just saying
15 ongoing investigation, full stop; therefore, no access to an
16 affidavit, that's not what we're here for. That's not what
17 I'm arguing. Our facts and our affidavit -- I'm not sure if
18 Your Honor has seen it, but --

19 THE COURT: So let me just disclose. I could see
20 it. Because of the nature of the ECF access that I have, I
21 can go push the buttons --

22 MR. JACOBSON: Sure.

23 THE COURT: -- in Judge Leung's case and see it.
24 But I think Mr. Parker might have a point here, which is
25 that you've offered an *in camera* review, and I think that --

1 to bolster your position that there's a compelling
2 Government interest, and I think that if that's the case,
3 then I ought to look at them *in camera*, and if there's some
4 appeal, then at least that information is then in this file
5 in this case and available for the Eighth Circuit to look
6 at.

7 Does that make sense?

8 MR. JACOBSON: It does make sense. And, Your
9 Honor, I think honestly it may be essentially compelled by
10 the case law, which requires you to make these specific
11 findings. I'm not sure that you could just take our word
12 for it here today about the -- I mean, it'll be clear when
13 you review the warrant that what I say here today is
14 accurate, but I do think in order to make the specific
15 findings that enable effective appellate review, that you're
16 going to need to take a look over the affidavit.

17 THE COURT: All right. Then we're on the same
18 page there.

19 MR. JACOBSON: And so with regard to some of the
20 key points that I want to make on **Gunn**, we're not here just
21 saying ongoing investigation, ergo, no public access, no
22 entitlement to the affidavit for the search warrant target.
23 Here, there were multiple factors that the **Gunn** court
24 considered in saying, you know, what types of considerations
25 justify keeping the document under seal.

1 First, the court said the affidavit was extensive,
2 it detailed the nature, the scope, the direction of the
3 Government's investigation. Even a cursory review, Judge,
4 of this substantial affidavit would reveal that it's
5 identical to the one in **Gunn** as far as the degree of detail
6 that was provided.

7 The second concern that the **Gunn** court articulated
8 was reference to recorded communications. We've got that
9 here to.

15 In **Gunn II** you have an even more -- a concern
16 about these privacy and reputational interests of folks who
17 were named in the warrant who may not even been named as
18 direct co-conspirators, but who were just indirectly named,
19 and the court -- even where the Government agreed to
20 unseal -- still said it would not be appropriate to do that.

21 Even if the Court were inclined to limit it just
22 to Mr. Lindell, there's still privacy and reputational
23 interests at stake. If I were named in a search warrant
24 affidavit, even if it weren't going to be released to the
25 public, I don't want anybody to see the fact that I'm in

1 there, especially another person who potentially maybe I
2 would cooperate against. It would give Mr. Lindell a window
3 into the investigation and it would allow him to compromise
4 the privacy and reputational interests of these other folks.

5 That's really what the **Gunn** -- that's what this
6 **Gunn** framework looks at and you can't circumvent it with
7 this Fourth Amendment analysis. As Your Honor pointed out,
8 the same -- I mean, if you look at **Up North Plastics**, it
9 just incorporates the **Gunn** framework on the other side, so
10 the compelling interest that the Government needs to
11 establish is no different whether it's a First Amendment
12 right or a Fourth Amendment right.

13 And so, Your Honor, there's really at the end of
14 the day no way to get outside of **Gunn** here. **Gunn** compels
15 sealing. And not just sealing of the affidavit, but of all
16 the search warrant materials, all of which were at stake in
17 **Gunn**. And it doesn't just -- and it doesn't permit
18 line-by-line redaction, because the same interests that the
19 Court articulated in **Gunn** that barred line-by-line redaction
20 in that case are at stake here. And those interests, I can
21 walk Your Honor through them --

22 THE COURT: Before you get to that, let me ask you
23 a question about our local rule, see if I'm understanding
24 this correctly.

25 The plaintiffs point out that under 49.1(d) -- and

1 I confess this is my first sort of detailed look at the
2 rule, so I could be missing something here.

3 The motion to seal is supposed to be publicly
4 filed and not disclose the information under a temporary
5 seal, and if I'm understanding the record in the MJ case, in
6 Judge Leung's case, that did not happen here.

7 MR. JACOBSON: That's correct, Your Honor, that
8 the motion to seal is not public.

9 THE COURT: Okay. So I suppose the way to ask you
10 the question, because they've told me that I should care
11 about that, but they haven't been specific about exactly how
12 it affects things here, is why either shouldn't I care or is
13 this just a negligence, inadvertence, oversight situation.

14 MR. JACOBSON: Well, at the outset I would say,
15 Judge, that a motion to seal a search warrant affidavit and
16 the search warrant materials, it has to be filed under seal,
17 before the search is executed, certainly. If this rule were
18 read in the rigid fashion that they're proposing, presumably
19 it would mean on day one when we get the warrant we've got
20 to -- you know, we've got to publicly file the motion to
21 seal, publicly file the order, give the world notice of the
22 fact that we're about to execute a search warrant at this
23 residence or this premises, and, you know, that is obviously
24 a transparently ridiculous principle. Even if the rule were
25 read more sensibly to suggest that maybe after execution now

1 you've got to put the stuff out on the docket, it still
2 would run into the problem that **Gunn** identified, which is
3 that the **Gunn** court said not just the affidavit, all of the
4 materials, all of the materials.

5 And so to the extent that this rule is
6 inconsistent with **Gunn**, ultimately **Gunn** is going to control.

7 THE COURT: So implicitly you're suggesting that
8 we've got something for the Federal Practice Committee here
9 in our district to review and evaluate.

10 MR. JACOBSON: I think that's fair to say, Your
11 Honor.

12 THE COURT: Okay.

13 MR. JACOBSON: Yes. So I don't think the local
14 rules are going to shift the analysis material here, because
15 there's a settled framework in place for search warrants and
16 it certainly doesn't involve filing motions to seal the
17 search warrant publicly because the public's right of access
18 is going to trump the Government's investigative need and
19 safety of agents, frankly.

20 Should I return to the redaction point or --

21 THE COURT: Please. Sorry. Thank you.

22 MR. JACOBSON: No, that's fine.

23 With regard to redaction, I think that is -- it's
24 a genuine concern. Is there a way to -- is there some less
25 restrictive manner that the public or Mr. Lindell could get

1 a look at this affidavit, and I think it's clear that the
2 case law provides that there is no meaningful way to redact
3 this affidavit effectively.

4 The **Gunn** court held that the affidavit in that
5 case shouldn't be redacted, that redaction was
6 impracticable, and the court highlighted three reasons why
7 that was the case and the three reasons sort of -- they're
8 similar to the three reasons that the court articulated
9 about why the affidavit should remain under seal in the
10 first place.

11 The first was a reference to recorded
12 communications. We've got that here.

13 The second was a reference to individuals who were
14 described other than the subject of the search warrant.
15 Again, that's clear. If Your Honor just takes an even quick
16 glance at the affidavit, it'll be clear that there is
17 descriptions about individuals beyond just Mr. Lindell.

18 And again, the third point that the court raised
19 was that -- the third reason why line-by-line redaction was
20 considered impracticable was that it would reveal the
21 nature, scope and direction of the Government's ongoing
22 investigation.

23 I took a look again this morning, Your Honor, at
24 the search warrant affidavit and was trying to envision a
25 universe where you could do line-by-line redaction, and it

1 really -- there is no way to render that document sensible
2 or readable in any way through line-by-line redaction. And
3 so for the same reasons -- and I would highlight again,
4 there I'm talking about the **Gunn I** -- those three issues
5 were raised by the **Gunn I** court.

6 In **Gunn II**, the Government did in fact concede to
7 line-by-line redaction of the affidavit. At that point they
8 were like a year and a half out from the search warrant, and
9 by the time the Eighth Circuit made its decision it was
10 almost two years after the search warrant. The
11 investigation was effectively over. The Government conceded
12 that its investigative objectives had largely been met. The
13 Government conceded that line-by-line redaction would be
14 appropriate and the public ought to have access to the
15 affidavit. And that was a discretionary decision, that the
16 Eighth Circuit said it was an abuse of discretion to permit
17 line-by-line redaction of that affidavit even with the
18 Government's consent, emphasizing that the privacy and
19 reputational interests that were at stake rendered that
20 line-by-line redaction inappropriate.

21 And so for those same reasons, I think, Your
22 Honor, that line-by-line redaction here is equally
23 inappropriate. Even if the Government consented to it, even
24 if the Court permitted it, it may still be reversible error
25 in the Eighth Circuit under **Gunn II**.

1 And so, Your Honor, I think for those reasons
2 there really is no -- there's no basis to authorize
3 Mr. Lindell, who is the subject of a search warrant, to get
4 a window into the Government's investigation, to get a
5 window into other people's involvement in the scheme that's
6 described in that affidavit. He has no entitlement to that
7 during an ongoing investigation.

8 And for that reason we would ask that Your Honor
9 keep the search warrant materials under seal at this time.

10 THE COURT: Thank you, Mr. Jacobson. Mr. Parker,
11 rebuttal, if you're inclined.

12 MR. PARKER: Just a few comments, Your Honor.

13 I want to quote from the ***Up North Plastics*** case
14 after recognizing that you can borrow from the First
15 Amendment analysis when looking at the Fourth Amendment.
16 The court said: "The Fourth Amendment requirement of
17 probable cause is meaningless without some way for targets
18 of the search to challenge the lawfulness of that search."

19 This is at the trigger of the difference between
20 public access, media access, that was sought in the ***Gunn***
21 case. And in addition, I would say Gunn himself, the
22 subject of the warrant, was not seeking the affidavit. In
23 fact, he wanted it to remain sealed. Entirely different, no
24 analysis of that in the ***Gunn*** case. Judge Noel in finding
25 that it is, you know, meaningless if we're not able to get

1 access, at least some access, to the affidavit really
2 underscores that difference.

3 Second point: The reason that the Government must
4 come forward with such specific findings is because of this,
5 and --

6 THE COURT: Can I -- sorry, Mr. Parker. I'm
7 looking at the quote in **Up North Plastics** that you just read
8 from. Is there another court that has said the Fourth
9 Amendment requirement, or in words or substance, that that
10 Fourth Amendment requirement's meaningless without some
11 way -- and I'm reading in a little bit here -- for targets
12 of the search to challenge the lawfulness of that search
13 pre-indictment? Is there another court that said that?

14 MR. PARKER: Another beyond this court?

15 THE COURT: Yeah. I mean, that's a sweeping
16 statement, pre-indictment.

17 MR. PARKER: Yeah, pre-indictment. I do believe
18 that the cases that we have cited say that, and I believe --

19 THE COURT: In that footnote?

20 MR. PARKER: Yeah. I think they are
21 pre-indictment, but again, as you can tell, my nimbleness
22 with those cases is not where it should be as I stand in
23 front of the Court, but certainly the review of those cases
24 would definitely be worthwhile.

25 I did also gather up all of the cases that have

1 cited the ***Up North Plastics*** case, as I indicated, and there
2 were 23. One of them cited it and rejected it, only one.
3 Now, there were several that cited it and ruled in a
4 different way or on a different issue and so did not rule,
5 but there were at least ten of those cases that -- and we
6 can provide you with a list of those if it would be of
7 assistance to Your Honor -- that cited the opinion in ***Up***
8 ***North Plastics*** favorably, and in fact, six of those cases
9 resulted in release of the affidavit.

10 The last point I want to make is to counter this
11 compelling governmental interest argument again and just
12 underscore that the warrant here has been open. It's got a
13 lot of information in it. The public nature of this, the
14 public nature of coverage, the way in which they decided to
15 seize the phone in such a public manner when it could have
16 been done otherwise, all of that has to play into whether or
17 not a seal is appropriate that prevents the subject of the
18 warrant from asserting his Fourth Amendment rights.

19 THE COURT: Thank you, Mr. Parker.

20 Actually, Mr. Parker, I'll keep you up there.
21 Let's move to the motion for return of property.

22 MR. PARKER: Your Honor, the warrant at issue in
23 this case is a modern-day general warrant. It is improper
24 under the Fourth Amendment. In fact, the Government
25 certainly has a right -- and we expect them -- to

1 investigate crime, but it must be within constitutional
2 boundaries, and this warrant, as carried out, was not within
3 constitutional boundaries and is not. The Government has
4 taken Mike Lindell's cell phone and the entire contents of
5 the cell phone, whether they relate to what is listed in the
6 warrant or not. All of it has been taken. All of it is
7 being reviewed. Now, by whom it's being reviewed, who
8 knows, and that's a problem. That's an issue that makes
9 their warrant constitutionally lacking.

10 The Government has taken a cell phone that has
11 enormous data on it, because Mike Lindell operates his life
12 off of that cell phone. Many people do, but he definitely
13 does. And he told those executing the warrant that very
14 fact.

15 The proprietary records include the records for
16 five separate businesses that he runs. He runs them from
17 his cell phone. And if you know Mike Lindell at all, I'm
18 not surprised by that. That's what he does. He moves
19 quickly and does a lot of work through that cell phone, five
20 separate businesses. His own personal financial
21 information, medical information, private personal
22 conversations with a whole range of people, all on that cell
23 phone. Discussions with his lawyers riddled throughout that
24 cell phone. Identities of people certainly included in that
25 cell phone. All unrelated to what is identified in the

1 warrant that may properly be reviewed.

2 Now, what the law indicates in the difficult
3 situation of cell phones, the modern-day digital world that
4 we live in, if you take a look at it, pre-digital world, the
5 Eighth Circuit issued **In Re Grand Jury Proceedings (1983)**.
6 And it went through this concept of you can't go rummage
7 through someone's personal records in order to separate out
8 the wheat from the chaff on what your warrant calls for.

9 In that case it was seven years of bail bonds
10 records related to a business. They went in and they took
11 all business records when they only had a warrant to look at
12 a portion of those records, and the Eighth Circuit went
13 through and analyzed that. Since that time, the digital age
14 has hit us and the Government has been faced with having to
15 deal with often important information for criminal
16 investigations that are contained on cell phones.

17 **In re Search of Apple iPhone**, which is a district
18 court decision out of the District of Columbia in 2014 --
19 the first cell phone -- well, iPhone came out in 2007 for
20 just context, Your Honor.

21 In 2014, the District of Columbia issued this
22 ruling and it has been followed in many places as it relates
23 to how the Government needs to deal with in the digital age
24 cell phones and searches as it relates to cell phones. The
25 court said that: "The digital world allows for

1 particularity and avoidance of being overbroad because there
2 are sophisticated search tools."

3 You would think, well, it's the other way around,
4 how do you separate things out. It used to be you go into
5 someone's house and you can search in places where the
6 information might logically be and that is allowed. You can
7 even do more than that when it comes to the digital world
8 because of search tools that exist.

9 But what the court said is, in order for a warrant
10 not to be a general warrant, the Government must come
11 forward with its search protocols. It must provide that to
12 the court in order that the court can determine whether or
13 not you can take the entire cell phone and you can go
14 through somebody's medical records and financial records and
15 everything unrelated to the criminality that is being
16 investigated, or whether you have to have these protocols
17 and follow them. The court needs to be able to pass on
18 those protocols.

19 Well, in this case there are no protocols, there
20 were no protocols, and the Government will come up here and
21 say, "Oh, no. We're doing this, that and the other." Well,
22 they're making it up as they go along. The court never
23 reviewed that, to our knowledge, and we never had access to
24 that. None of the protocols or safeguards were ever -- nor
25 have they been -- provided to us. What was provided was

1 what Mr. Lindell was handed, and what he was handed was a
2 warrant that identifies the items that they have a right to
3 seize. There was no safeguard protocol added to the warrant
4 and the warrant is -- obviously it was part of the
5 complaint, but then it was included in our papers, I
6 believe, as Exhibit 1. So ***In Re Search of Apple iPhone*** is
7 one of the leading cases as it relates to what the
8 Government needs to do in the digital age to avoid a general
9 warrant.

10 But then it comes to this district, and in fact,
11 in ***U.S. vs. Moulder***, Judge Tunheim just a few months ago
12 dealt with this very issue, and he dealt with it in much the
13 same way that ***Apple iPhone*** dealt with it.

14 In the ***Moulder*** case he states that taking an
15 entire account and then parsing it is a general warrant.
16 You can't -- in that case it was taking an entire email
17 account and then sorting the wheat from the chaff. He
18 determined that is a general warrant. You cannot do that.
19 Similarly, taking an entire iPhone and trying to separate
20 the wheat from the chaff without identifying specific types
21 of procedural safeguards to use so that the Court can pass
22 on that is also a general warrant, and that's what we're
23 dealing with in this case.

24 The court talked about the two-step process that
25 I'm sure the Government is going to talk about today: "No,

1 no. We have a two-step process, so we protect this from
2 being a general warrant." However, even a cursory view of
3 the **Moulder** case shows that the two-step process that the
4 Government used there just a few months ago and used in this
5 case as well is insufficient. It does not pass
6 constitutional muster. Step two is okay, but taking the
7 entirety of the cell phone and not having a process for
8 determining what is responsive to the warrant -- because the
9 warrant did identify with some particularity it could be
10 argued. We think the warrant was already overbroad, two
11 years of texts and everything, two years of everything on
12 the cell phone, as well as items listed from A to X
13 throughout were very similar to what was found invalid in
14 the **iPhone** case.

15 But as it relates to **Moulder**, step one was the
16 problem because there were not safeguards. As the court
17 said: "The Government cannot ask for every piece of
18 information related to Moulder's email account without
19 having probable cause to access all that information."

20 And the court even went so far as to say:

21 "The court has considered whether holding that the
22 email search warrant was unconstitutionally overbroad will
23 burden the Government in execution of search warrants going
24 forward. The court does not believe it will."

25 That is an issue that the Government will likely

1 raise. "Oh, if we're required to have these safeguard
2 protocols and go through this entire process, it's going to
3 be overly burdensome for every investigation," which
4 includes a cell phone, and most -- many might -- include
5 cell phones. Too burdensome. Well, the Constitution
6 doesn't take a back seat to burden. The Constitution
7 requires sometimes that they take an extra step and that
8 they establish protocols and safeguards and that those are
9 reviewed by the court before they are able to take from
10 someone their cell phone, which oftentimes is really their
11 data life in full.

12 Now, the court identified in **Moulder** some ways in
13 which safeguards or protocols could be articulated, and
14 keyword searches could be done in order to separate down,
15 et cetera. We would say at a minimum the Government should
16 not be allowed to get any of Mr. Lindell's information until
17 a third party has reviewed, and we would be open to a
18 special master being put in place in this case in order to
19 separate out so that the Government doesn't violate
20 Mr. Lindell's Fourth Amendment rights or, for that matter,
21 his First Amendment rights.

22 I want to move on to -- setting aside now for a
23 minute the general warrant issue, the issue of
24 attorney-client privilege will likely come up and the
25 Government may well say, "Oh, no, no, no. We have a filter

1 team and because we have a filter team that takes care of
2 the general warrant issue." No, it doesn't. It doesn't
3 come anywhere near taking care of what was discussed in
4 **Apple iPhone** or in the **Moulder** case. In fact, it talks
5 about safeguards and a number of indicia related to
6 procedural safeguards, listing how the phone's going to be
7 imaged, the process, the team or the special master that is
8 going to review it, that they would allow. The relationship
9 and what information does the investigative team get. All
10 those things need to be listed. The search terms, as I
11 mentioned before, when the process will be completed in
12 order that the property can be returned. All of those
13 things are suggested as being important.

14 In terms of a filter team, having somebody else in
15 the Government review other than the investigative team does
16 not resolve at all the violation that is at issue of the
17 Constitution. In fact, that has been not specifically ruled
18 on, but it has been commented on by Judge Tunheim in the
19 **Heppner** case where he agreed with Judge Noel, saying that,
20 in fact, that sort of filter-team process is somewhat like
21 the fox guarding the hen house, and we would agree with
22 that. The Fourth Circuit in 2019 in **In re Under Seal**
23 (**Search Warrant**) specifically rejected that type of filter
24 process for determining attorney-client privilege.

25 And by the way, that filter process doesn't deal

1 at all with all the other information that the Government
2 has no right to of Mr. Lindell's. And I've gone through the
3 list, but it's broad, much broader than just his discussions
4 with a lawyer. At a minimum a filter team has to include a
5 special master, in our judgment.

6 Thirdly -- actually fourthly --

7 THE COURT: Every case where a cell phone is
8 seized?

9 MR. PARKER: I'm sorry, Your Honor?

10 THE COURT: Are you suggesting that a third-party
11 neutral is required in every instance where a cell phone is
12 seized?

13 MR. PARKER: No, I am not suggesting that. I'm
14 suggesting under the facts of this case there can be no
15 doubt, because --

16 THE COURT: What makes this case special?

17 MR. PARKER: What makes it special is the amount
18 of information, the type of information that is on that cell
19 phone. Not everybody is going to have or carry or include
20 on their cell phone all of what Mr. Lindell has on his cell
21 phone. Most people will have some things beyond the
22 warrant, but maybe not, and it depends on what the warrant
23 calls for. But if it is a situation in which someone does
24 have information beyond and if that's the majority of
25 situations, yes, it's got to be somebody outside of the

1 Justice Department that provides for that. This circuit,
2 this district, has never ruled that a filter team is
3 sufficient and works or operates. And in fact, in our
4 review, at least, in the **Heppner** case, Judge Tunheim was
5 very, you know, critical or looked at it with a jaundiced
6 eye, it seemed.

7 The execution of the search warrant also raises --

8 THE COURT: I have to ask because you said the
9 district's never done something. So if I go do a Westlaw
10 search and I start poking around for decisions that have
11 denied motions to suppress on this ground, I'm not going to
12 find one?

13 MR. PARKER: My comment is only as it relates to a
14 filter team. I don't believe -- and, you know, whether we
15 missed it or not, it's possible, but I can say we looked.

16 THE COURT: You did that search.

17 MR. PARKER: We did.

18 THE COURT: Okay. All right. Well, I respect
19 that. I get that. Okay. Thank you, Mr. Parker.

20 MR. PARKER: Looking at execution of the warrant
21 itself, we find other constitutional violations related to
22 the execution.

23 First --

24 THE COURT: Okay. So I get this. I get where
25 you're going and I've got sort of a couple of fundamental

1 questions here that I think now is the time to ask.

2 The first is that the basis for the motion
3 originally, it was 41(g).

4 MR. PARKER: One of the bases. I think we also
5 included a challenge to the warrant itself under the Fourth
6 Amendment.

7 THE COURT: Well, the reason I'm sort of stuck on
8 41(g) is the title of the motion.

9 MR. PARKER: Yes.

10 THE COURT: Motion for a TRO and for return of
11 property pursuant to Federal Rule of Criminal Procedure
12 41(g). So, are you -- I don't think you're walking away
13 from that now.

14 MR. PARKER: No, we're not.

15 THE COURT: Okay. You've got 41(g) over here and
16 it has standards and factors that I'm supposed to apply to
17 determine whether property in this situation should be
18 returned. And then you've got these what I'm going to call
19 freestanding constitutional arguments over here that it
20 seems to me you're asserting separately.

21 Ordinarily -- and sorry. I could be missing
22 something really basic here. I'm not saying that -- I'm
23 genuine when I say that.

24 Ordinarily when constitutional arguments are
25 raised, there is some other legal principle in play that

1 permits them to be raised: 1983, a **Bivens** action, a
2 proceeding where you are challenging the admissibility of
3 evidence post-indictment in a criminal case.

4 Can you cite a case where a court's accepted
5 freestanding constitutional arguments like this as a ground
6 to challenge some action, particularly in an investigatory
7 phase, that the Government's undertaking?

8 MR. PARKER: I think both the **Apple iPhone** and the
9 **Moulder** cases are talking about --

10 THE COURT: But the **Apple iPhone** case is an
11 application for a search warrant, right? And the magistrate
12 judge in the District of Columbia, who's a big e-discovery
13 person, that's his area, is saying: No, I'm going to deny
14 it and I'm going to write about why I'm denying it,
15 presumably so that going forward the Government in the
16 District of Columbia knows, at least when you're in front --
17 well, wherever that's at today, I'm not sure, but at least
18 there that's the standard. Different procedural context.
19 We're past that here.

20 MR. PARKER: We are past that. I believe you have
21 a right as the subject of a warrant that has been issued to
22 challenge that warrant in court in a preliminary injunction
23 procedural posture.

24 THE COURT: That that's where I need the case.
25 That's where I'm asking about do you have a case.

1 MR. PARKER: Not specifically in this district.
2 Actually, I would have to look at whether that procedural
3 posture that we're sitting in right now -- we have not
4 looked at that.

7 MR. PARKER: And we would -- you know, we would
8 have to look at it. The **Moulder** case was in I think a
9 similar posture, although not an injunction.

10 THE COURT: **Moulder** is post-indictment. **Moulder**'s
11 a criminal procedure.

12 MR. PARKER: It's a criminal procedure case on the
13 email search warrant. Yeah, you're right, Your Honor.

14 THE COURT: Suppression.

15 MR. PARKER: It deals with the Fourth Amendment,
16 but it's post-indictment. So you're saying we have to wait
17 until indictment in order to challenge the search warrant.
18 I don't -- I just -- I would have to look specifically at
19 that question and I would ask for the ability to be able to
20 brief that question, because I would be surprised that if a
21 search warrant is facially invalid, it's obviously invalid,
22 it was executed in an obvious unconstitutional way, that the
23 Government can do that with no recourse by the recipient for
24 months and months and maybe ever if they never are indicted,
25 and I just don't think that's the law.

1 THE COURT: Well, you could in theory have a
2 **Bivens** damages action down the road. You could in theory
3 have a 1983 action if you're looking for damages, and again,
4 if you're I suppose indicted and cleared or not indicted at
5 all, but --

6 MR. PARKER: Meanwhile, your --

12 MR. PARKER: I'd like to be able to review that
13 issue and I don't think that the procedural posture of this
14 case we have looked at closely. I do think that the
15 constitutional analysis can be used in support of 41(g) as
16 well, which specifically identifies an avenue for redress at
17 this time.

18 If the Court -- you know, I was going to go into
19 execution of the warrant.

23 MR. PARKER: Fair enough, Your Honor. It
24 definitely is important for us to respond to that.

25 The execution of the warrant, you have plain

1 automobiles, no marked squads, plainclothes individuals
2 surrounding Mr. Lindell's vehicle. There's nothing in the
3 record to indicate what the basis for that was. There's --
4 this is not a case involving, you know, drug warlords or
5 some sort of danger to the public scenario. It's not a case
6 where somebody has ever fled or shown a propensity to
7 destroy or hide information. We don't know of any of that.
8 It's done in a public place as well as if one of those
9 things might occur.

10 They detained him in custody, unable to leave, for
11 45 minutes. The first 25 to 30 minutes were asking him
12 questions while he was in custody, questions specifically
13 focused on this investigation. This is all prior to the
14 warrant being executed, so it was separate from the purpose
15 of their detaining him to execute the warrant. He was not
16 Mirandized. He was not allowed -- at least for some time --
17 to call his lawyer.

18 It raises a number of constitutional issues and
19 goes to the First Amendment issue of why that was done. Was
20 there an emergency that this needed to occur at that moment
21 at that location in the way that it occurred? Was there
22 something imminent that required that to happen? Were there
23 destruction indicators or indicia? Was there some sort of a
24 compromise of the investigation if it were not done that
25 way? We have received no response to that in the record to

1 date in this case. The question of whether the standard
2 here of **Davis v. Dawson** in terms of the least intrusive
3 means of effectuating a stop, whether to execute a warrant
4 or ask questions of someone, did not occur in this case.

5 THE COURT: How do you respond to the point that
6 the Government makes that your client went and talked
7 publicly about the event and described the agents in
8 positive terms?

9 And I suppose another factor here that I haven't
10 thought about, but I'm thinking about it now, is that I
11 think your client's admitted at least that he had firearms
12 in the car. He was duck hunting, correct?

13 MR. PARKER: He was. He was duck hunting. That's
14 a reason not to do it the way that they did it. There is no
15 indication that this person has ever had any violent
16 tendencies. The fact that he is a duck hunter does not give
17 grounds to do this. In fact, it created more of a danger.
18 Who are these people? His life has been threatened in the
19 past --

20 THE COURT: What about his public statements to
21 the effect --

22 MR. PARKER: In terms of the public statements,
23 you can violate somebody's constitutional rights politely.
24 That can happen. And it does not change the Constitution or
25 the manner. And frankly, it doesn't change the intimidating

1 element of this whole public issue. The fact that he has
2 made these violations public and whether or not he is
3 intimidated, the associates that he has on his phone, that
4 people see this happening, could well be intimidated and it
5 could squelch his ability to associate with people. They're
6 going to go, "We're not going to have anything to do with
7 him."

8 This was reported separate from Mike Lindell. He
9 wanted it to be reported the way that he knew it occurred,
10 not by the media sources and what their spin or narrative
11 might be. So it was going to be reported, it had already
12 been reported on widely across the country in terms of what
13 happened irrespective of what his comments were shortly
14 after.

15 There's a question that arises that we again are
16 hamstrung at knowing the answer to in terms of how the
17 Government found Mr. Lindell in a place that he has either
18 never been or very, very seldom has ever been, in Mankato,
19 Minnesota, at this particular Hardee's, and it raises the
20 specter -- and that's all -- as to understanding what the
21 legitimate manner of locating him was.

22 In a similar vein, we've heard about recordings
23 that exist as it relates to this investigation, and that
24 indicates that there may be wiretapping going on as it
25 relates to this investigation. We don't know that as well,

1 but we believe we have the right as the subject to know
2 whether or not that sort of conduct has occurred and whether
3 it was appropriate to have occurred.

4 Finally, I just want to comment -- and maybe our
5 papers do this sufficiently -- as it relates to the
6 **Younger/Deaver** doctrine that the Government has raised,
7 claiming that we are attempting to interfere with and/or
8 enjoin the entire Government process of investigation.
9 That's not what we're doing. We just want our stuff back
10 and the data not to be accessed, because the warrant in this
11 case was improper. It was improper under 41(g), it was
12 improper under the Constitution, and therefore the
13 information should not -- which is still in the possession
14 of the Government -- shouldn't be allowed.

15 THE COURT: So I understand the distinction you're
16 trying to make there, Mr. Parker, I think, but I guess I
17 need authority for that. **Younger** doesn't say you're not
18 interfering with -- I'm not aware of a line of cases
19 applying **Younger** that say you're not interfering with the
20 Government -- an ongoing criminal investigation or an
21 ongoing criminal proceeding if you only ask for the
22 Government not to have access to key pieces of evidence or
23 evidence it thinks might be important.

24 MR. PARKER: Your Honor, **Younger** does not say that
25 if the Government acts in an unconstitutional manner that

1 the court has found unconstitutional, that they can continue
2 to proceed with the information that they have obtained.

3 THE COURT: Well, I think in some respects that's
4 exactly what it says. In other words, it's an abstention
5 doctrine, right?

6 MR. PARKER: Yes.

7 THE COURT: It's telling you that I ought to
8 abstain for some period of time and allow things to run
9 their course even if there is an arguable constitutional
10 violation, and then there is a procedure later whereby that
11 arguable constitutional violation gets adjudicated. I think
12 that's exactly what **Younger** says. If I'm wrong about that,
13 I need authority.

14 MR. PARKER: Yes, and I think in our briefing we
15 provide the response to **Younger** in some detail as it relates
16 to the briefing, if I may.

17 THE COURT: You may, absolutely.

18 (Pause)

19 THE COURT: I'm looking through -- oh, here we go,
20 page 19 of your reply brief.

21 MR. PARKER: And we also raised the **Lewellen**
22 decision. **In re Grand Jury Proceedings** is cited, Your
23 Honor, as well as the **Lambert** case.

24 Now, the **Lewellen** and the **Z.J.** cases also provide
25 exceptions to **Younger**. They were showing that a

1 prosecution -- so they were post-indictment -- was brought
2 in retaliation for or to discourage constitutional -- the
3 exercise of constitutional rights would justify an
4 injunction. That is the holding in **Lewellen**. You find that
5 on page 18 of our papers.

6 But I would cite you to those cases that we have
7 cited, **Doran**, **Lambert**, and the **In re Grand Jury Proceedings**
8 as it relates to the **Younger** doctrine.

9 Thank you, Your Honor.

10 THE COURT: Thank you, Mr. Parker.

11 Mr. Jacobson?

12 MR. JACOBSON: So, Your Honor, I want to step back
13 for a minute and kind of look at what's happening from a
14 high-level, sort of a bird's-eye view of what's happening.

15 The Government's warrant and the execution of that
16 warrant were routine and unexceptional. What is exceptional
17 is what's happening here today as Your Honor has recognized
18 in response to that warrant, a deluge of litigation. Over
19 the course of three weeks a TRO motion that Your Honor had
20 to respond to within a day, a P/I motion, a motion filed two
21 weeks later to get a copy of the affidavit that was
22 purportedly necessary in order to effectively litigate the
23 P/I motion, a motion to expedite the motion to get the
24 affidavit that was already late-filed. And all of this
25 litigation is occurring over what, over a search warrant

1 that looks like every phone search warrant, Your Honor, that
2 you've ever seen, a search warrant that was by all accounts
3 executed professionally and respectfully by federal law
4 enforcement.

5 We are not genuinely here today because of
6 anything that the Government did. We are here today because
7 of who the plaintiffs are, and because they believe that
8 their speech on matters of public concern, that resembles
9 speech that many of us have on matters of public concern,
10 entitles them to some kind of special treatment here in this
11 courtroom in civil litigation, in criminal litigation, and
12 that's really ultimately why we're here today.

13 At bottom, the plaintiffs cannot win on this
14 preliminary injunction motion at the highest level for the
15 reason that Your Honor identified and that I just did not
16 hear a good response to, which is these freestanding
17 constitutional claims have no precedent. They are extremely
18 unusual. You can't just come into court and say, "The
19 Government violated my First Amendment rights. I need a
20 declaration that that happened. The Government violated my
21 Fourth Amendment rights. I need a declaration that that
22 occurred." That's not how you invoke Article III
23 jurisdiction, and that kind of abusive process is a core
24 problem here with this litigation, with this lawsuit.

25 The Government respected the plaintiffs' rights.

1 The Government obtained a warrant here, a neutral,
2 disinterested magistrate, Magistrate Judge Leung. He
3 determined that there was probable cause on the basis of the
4 affidavit that we provided. And so ultimately the
5 plaintiffs are unlikely likely to succeed on any of these
6 unusual constitutional claims, the irreparable harm and the
7 public interest factors. Ultimately, it was clear from the
8 briefing, I think, that they rise and fall with a
9 determination on likelihood of success.

10 The plaintiffs also cannot be successful on this
11 41(g) motion to obtain the cell phone because they can't
12 meet any of the factors.

13 THE COURT: Well, if I'm asking the question the
14 right way, I think the answer is that the preliminary
15 injunction motion rises or falls on the 41(g) analysis.

16 MR. JACOBSON: So, Your Honor, the way we -- I'm
17 sorry. Go ahead.

18 THE COURT: One and done. In other words, once I
19 evaluate the constitutional claims as part of that, whether
20 there's a callous disregard for constitutional rights as I
21 understand the law, that's it. There isn't a case out there
22 that supports this motion that in addition to or aside from
23 Rule 41(g) I look at or consider alleged constitutional
24 violations in this context.

25 MR. JACOBSON: So, Your Honor, the way we've --

1 and I think that's a perfectly fair way to conceptualize it
2 given the packaging of this Complaint, because the Complaint
3 has five counts and they're all freestanding constitutional
4 counts, right? And so where is 41(g) there? And Your Honor
5 recognized this in your order denying the denying the TRO,
6 which is where exactly does 41(g) play out in the context of
7 the constitutional claims.

8 The way the Government has conceptualized it and
9 the way we briefed it is, there's a 41(g) claim and it's a
10 freestanding 41(g) claim and there would be jurisdiction in
11 this court to potentially entertain, you know, ancillary
12 equitable jurisdiction to entertain the 41(g), and then
13 there's the five counts, but that's being potentially
14 generous to the plaintiffs because that's not technically
15 the way they packaged the litigation.

16 THE COURT: Well, and that's why I'm asking the
17 question. If I'm wrong, then I need to know, right, because
18 there are two ways to handle the 41(g) petition: one,
19 fast-track it, decide it on the merits; two, seek a TRO,
20 failing that a preliminary injunction, which is what the
21 plaintiffs here have done. If there is some legal
22 foundation for the assertion of independent, freestanding
23 constitutional claims apart from 41(g), then I need to
24 consider them and I need to know about that. That's why I
25 asked Mr. Parker that question and that's why I'm raising it

1 now. It seems like a really important issue.

2 MR. JACOBSON: Your Honor, from the Government's
3 perspective there is no basis to invoke the Court's
4 jurisdiction on the five freestanding constitutional claims.
5 If you're being generous to the plaintiffs here, there is a
6 mechanism to get into court on the 41(g) if it had been like
7 it was in **Wilansky**, for example, a 41(g) claim. They
8 brought a civil lawsuit saying under 41(g) we get the
9 property back and here's why.

10 And so I guess, Your Honor, I think the easiest
11 way to analyze this is to analyze the free -- and again,
12 this is being generous to the plaintiffs -- is to analyze
13 the constitutional claims separately from the 41(g).
14 Ultimately, it doesn't matter how Your Honor chooses to
15 package it. That's the way we've briefed it, that's the way
16 we've conceptualized it, is that these are distinct avenues
17 to invoke the Court's jurisdiction, the five counts claiming
18 constitutional violations and the 41(g).

19 THE COURT: Okay. And then in terms of that, I
20 mean, **Younger** is an abstention doctrine. I would think that
21 that's where I've got to start.

22 MR. JACOBSON: That's correct, Your Honor, at
23 least with respect to the constitutional claims. I don't
24 believe that **Younger** is going to bar him from getting in on
25 the 41(g).

THE COURT: Right.

MR. JACOBSON: And so, Your Honor, I think I'll start with the P/I briefing, again conceptualizing it the way that we've done it, which is the P/I is separate from the -- or the five freestanding counts are separate from the 41(g), so I'll divide my argument between the P/I issues that are raised on the five counts, the likelihood of success, irreparable harm, et cetera, and on the other hand the 41(g) issues.

10 And with regard to the freestanding counts, **Deaver**
11 and **Younger**, these cases apply. They bar the Court from
12 issuing the kind of relief that Mr. Lindell is asking for
13 even if there were some legitimate avenue to invoke the
14 Court's jurisdiction here.

20 There's a line from **Deaver** that I think is
21 particularly applicable here, and the line is: "Prospective
22 defendants cannot, by bringing ancillary equitable
23 proceedings, circumvent federal criminal procedure," and
24 that is exactly what's happening here.

25 The plaintiffs' argument is that: Well, no, we're

1 not -- you know, **Younger** doesn't apply because we're not
2 trying to enjoin the criminal investigation. We just want
3 our stuff back I believe is what I heard today, but you have
4 to think about the practical impact of a determination that
5 they're entitled to relief here.

6 Let's say Your Honor granted declaratory relief
7 and said: "You know what? I agree with you, Plaintiffs.
8 The phone couldn't be taken because it was a violation of
9 his First Amendment rights, and the reason is because the
10 Government is retaliating against Mr. Lindell for his speech
11 on matters of public concern."

12 What conceivable investigative step could be taken
13 to -- what legitimate investigative step could be taken by
14 the federal government to investigate Mr. Lindell's
15 activities, whatever they were, after a ruling like that?
16 It's --

17 THE COURT: Sorry. And what's the limiting
18 principle?

19 MR. JACOBSON: There is no -- he would wield that
20 ruling to bar any investigation into him. It would immunize
21 him from federal criminal investigation. And that's why,
22 Your Honor, I think at the end of the day, the practical
23 impact of what he's seeking is an injunction against the
24 federal criminal investigation and that's exactly what
25 **Deaver** bars. That's the kind of behavior that **Younger**, the

1 kind of judicial action that **Younger** is counseling against.

2 Your Honor, in terms of the avenues that they
3 proposed for circumventing **Younger**, I heard three things
4 today. I heard **Lewellen**, I heard, I guess, the **Lambert**
5 decision, and **In re Grand Jury Proceedings**.

6 If Your Honor were to take a look a close look at
7 the **Lewellen** case, this is a case -- and I'm looking for my
8 own brief on it, but I can't find it, but the case involved
9 a small-town investigation into and prosecution of an
10 attorney who was representing a black minister. And the
11 attorney had been subjected to mistreatment in that -- there
12 was a six-day hearing, I think, where the attorney was
13 subjected to mistreatment because he was advocating on
14 behalf of this black minister client. And in addition,
15 there was an implication from the hearing that the
16 Government had indicted the black attorney in order to
17 impact his Senate campaign. So there was Government --
18 there was a six-day hearing. There was a strong nexus
19 between the indictment of the individual and his protected
20 activity, defending his client in -- it was rape litigation.

21 This is a far cry, I think, from what happened in
22 **Lewellen**. There is no nexus, no nexus other than pure
23 speculation, Your Honor, between on the one hand
24 Mr. Lindell's speech on matters of public concern and on the
25 other hand the search warrant.

1 In terms of the other cases that were cited to
2 circumvent **Lewellen**, there was the **Lambert** decision. This
3 was a case where the -- there were -- it was a small-town
4 murder -- or a beating of some kind. It was caught on video
5 by an individual, just a third party videotaped the event.
6 The police took the video and refused to give it back to the
7 individual, and there was no search warrant or anything like
8 that. And this individual sued the police department to get
9 a copy of the video back, saying that he had a First
10 Amendment right to distribute the video, to sell the video,
11 and the court determined that, yes, they would require the
12 Government to return the video, but the reason they did it
13 was because there was no search warrant to obtain that
14 video. There was no -- the video was not lawfully in the
15 Government's possession and the individual was being barred
16 from exercising his First Amendment right, distribution of
17 the video.

18 Here, there is a search warrant to obtain
19 Mr. Lindell's phone, probable cause was found, and in
20 addition, he can exercise his First Amendment rights all day
21 long, and since this warrant was executed, he's been doing
22 that, Your Honor. So, you know, you can see that. That's
23 in the record in Exhibit 1 from our opposition, is even the
24 night after the search warrant he's out talking about the
25 warrant, so he hasn't been chilled, he hasn't been barred

1 from exercising his First Amendment rights, and there's no
2 nexus between his speech and the search warrant here.

3 The third case that was cited to purportedly get
4 around the **Younger** decision was ***In re Grand Jury***
5 ***Proceedings***, which I don't believe has any relationship to
6 **Younger**, but I'll distinguish it anyway, because the case
7 relates to the plaintiffs' argument about an overbroad
8 warrant.

9 In that case there was an investigation into a
10 bail bond entity, a bail bondsman, and the warrant
11 essentially allowed the Government to seize seven years of
12 documents. They went in and took an enormous number of
13 documents. There was no real limitation to what they could
14 take. The warrant did not even specify the offenses that
15 were at issue, didn't even say: This bail bondsman violated
16 statute A, statute B, statute C. It did not list specific
17 individuals who were purportedly involved in the event. And
18 it didn't list any files, any specific files that were at
19 issue in the litigation.

20 So in our case, Your Honor, of course we listed
21 the statutes. Of course we listed the list of individuals.
22 Our Attachment B is detailed about exactly what it is we
23 want on Mr. Lindell's phone, and the circumstances just
24 could not resemble any less the circumstances in ***In Re Grand***
25 ***Jury Proceedings***, the 1983 Eighth Circuit case that in any

1 event has nothing to do with **Younger**. So **Younger** applies,
2 Your Honor, **Deaver** applies, and this is an effort to
3 undermine a good-faith federal criminal investigation.

4 I want to talk about -- I can walk through
5 likelihood of success on each of the counts or I can focus
6 on the ones that Mr. Lindell has focused on here today.

7 THE COURT: I think focusing on the ones he's
8 focused on would be helpful, but if you have comments on the
9 others and you think you want to create a record on that,
10 that's just fine.

11 MR. JACOBSON: Your Honor, I can speak very
12 briefly about the other ones, but walking through the
13 counts -- and it's been difficult, because Your Honor's --
14 I'm sure you've had a chance to read the reply brief, but
15 it's hard to map on what in the reply brief goes with which
16 count. And it gets to one of the problems in this
17 litigation, which is that it's unclear where the different
18 arguments fall, which argument supports which count. It's
19 been difficult to effectively counter this litigation where
20 we're at a bit of a loss to see what goes where, but here's
21 the best that we can do in terms of what Mr. Lindell is
22 claiming with regard to the different counts.

23 On Count 1 -- this is the First Amendment -- the
24 purported First Amendment violation. This is -- ultimately
25 this count is -- it arises from the plaintiffs' view that

1 they're entitled to some kind of special treatment because
2 they speak on matters of public concern.

3 But the **P.J. Video** case that we cited in our brief
4 makes clear that it's the same standard in the First
5 Amendment context whether someone's speaking on matters of
6 public concern or not. There's no heightened protection in
7 the Fourth Amendment context or insulation from
8 investigation on the basis of someone's First Amendment
9 speech.

10 The **Zurcher** case which we cited in our brief,
11 another Supreme Court case, provides that a search warrant
12 protects -- a search warrant and the procedures associated
13 with a search warrant protect against any potential First
14 Amendment harm, and that's exactly what we did here, Your
15 Honor. We didn't -- we didn't just go into Mr. Lindell's
16 phone and take all of the -- I mean, we got a search warrant
17 for it, and that's what the **Zurcher** case makes clear, that
18 that is sufficient protection for someone's First Amendment
19 rights. The target of the search warrant is not speech.
20 It's not Mr. Lindell's speech on matters of public concern.
21 It is very specific. If Your Honor were to take a look at
22 the Attachment B about what it is that we believe -- that
23 the judge believed we had probable cause to seize, and that
24 again distinguishes the circumstances here from the ones in
25 the **In re Grand Jury Proceedings** case where it was

1 essentially limitless what the Government could take from
2 the bail bondsman.

3 As far as the warrantless collection of cell site
4 location information, which is Count 2, that was briefly
5 mentioned here today, suffice it to say, Your Honor, that
6 there is zero likelihood of success on this count and we can
7 explain why in an *ex parte* filing if that will be helpful to
8 Your Honor.

9 THE COURT: That would be. We'll address the
10 nature of that *ex parte* submission here when everyone's done
11 arguing.

12 MR. JACOBSON: Okay. With regard to Count 3, the
13 purportedly unreasonable search or seizure of Mr. Lindell's
14 phone, this is -- this was sort of the key argument here
15 today from Plaintiffs, which is that the warrant is
16 overbroad, the two-step process is unconstitutional. You
17 need a search protocol, you need a special master, because
18 Mr. Lindell speaks on matters of public concern and so he
19 gets special treatment.

20 And this warrant first off looks like every search
21 warrant for a phone that I've ever done, and certainly
22 probably, Your Honor, that you've ever seen. It is a
23 regular, standard practice search warrant. It is not
24 overbroad. It is highly particular. It has a time period
25 that is -- I believe it's less than two years of information

1 that's sought. There are enumerated offenses. There is an
2 enumerated list of individuals who have to be involved for
3 us to seize the information. In other words, if either
4 Mr. Lindell or this other individual is not involved, it
5 would likely exceed the scope of the warrant. We couldn't
6 seize it. There is a highly specific list of records that
7 we -- that Judge Leung found that we had probable cause to
8 seize. It couldn't be much more specific about what it is
9 that we're entitled to seize under this warrant.

10 THE COURT: All right. So this reminds me of two
11 other questions that I had coming in here today, or
12 concerns.

13 If I go this route, have you thought through --
14 has the Government thought through the preclusive effect
15 that any ruling here might have down the road?

16 MR. JACOBSON: If Your Honor were to make a
17 determination that there was a Fourth Amendment violation?

18 THE COURT: No, that they're -- if I reject
19 constitutional claims asserted here, has the Government
20 thought through -- and Mr. Parker, I'm going to have the
21 same question for you -- a preclusive effect of I guess
22 whatever the decision is here down the road.

23 MR. JACOBSON: I understand, Your Honor. In terms
24 of suppression potentially, right? For example, if
25 Mr. Lindell were to be prosecuted --

THE COURT: Collateral estoppel.

2 MR. JACOBSON: -- would he be barred from
3 litigating the issue again or would it be essentially a
4 litigated issue. Your Honor, I haven't thought through that
5 issue. I'm not certain how -- I'm not certain of the impact
6 of these -- that kind of pre-indictment litigation on
7 post-indictment suppression litigation.

12 MR. JACOBSON: I think that's fair, Your Honor.
13 It certainly could. It certainly could.

14 THE COURT: Okay.

15 MR. JACOBSON: With regard to the argument that
16 Mr. Lindell has put forward regarding a specific protocol,
17 we have to have a specific protocol, the **Moulder** case calls
18 for a specific protocol. The **In re iPhone** case calls for a
19 specific protocol.

20 First, the **Dalia** Supreme Court case is clear. The
21 manner of execution of a warrant is discretionary by the
22 agents. It still has to comply with the Fourth Amendment's
23 reasonableness standards. And so if later down the line
24 there's evidence that the Government exceeded the scope of
25 the warrant in seizing material, Mr. Lindell has a remedy

1 and that's suppression. But I think at a higher level not
2 only are those cases inconsistent with **Dalia**. They're also
3 inconsistent with Eighth Circuit precedent, like the **Bach**
4 case that we cited in our brief which made clear that the
5 two-step -- which the two-step process was not directly
6 litigated, but the Eighth Circuit did determine in that
7 circumstance that a two-step warrant -- I think it was to
8 Yahoo in that case -- an ECPA warrant was appropriate.

9 I also think -- there is another case as well that
10 we ought to have cited in our briefs, Your Honor, but did
11 not, and that's **United States vs. Cartier**. It's 543 F.3d
12 442. That case directly addressed whether a specific search
13 protocol was necessary. I believe that was a child
14 pornography case and the defendant was claiming that the
15 Government had essentially done exactly what Mr. Lindell is
16 claiming the Government is doing here, which is that it had
17 gone -- it had -- there was no system for the Government's
18 review in that case of computer materials, and the Eighth
19 Circuit rejected any kind of *per se* rule that a search
20 protocol was necessary.

21 I think Your Honor also noted that -- the D.D.C.
22 case, the **iPhone** case. The magistrate judge, Judge
23 Facciola, has been reversed on similar issues by -- in
24 D.D.C. And so, Your Honor, I think that those cases
25 ultimately are not even necessarily good law in D.D.C.

1 anymore. I believe the Chief Judge overruled one of his
2 decisions, not this specific one, I don't believe, but a
3 different one, again finding unconstitutional the absence of
4 a search protocol and a two-step process.

5 I think also just thinking about **Moulder**, even if
6 **Moulder** were good law, what **Moulder** addresses is the
7 two-step warrant protocol in the context of a search warrant
8 to an electronic storage provider. I think in **Moulder** -- I
9 can't -- I believe it was Google in **Moulder**.

10 So the judge is saying that the Government can't
11 just go to Google and get the whole account at step one and
12 then go through and pick out the specific things that are
13 responsive to the warrant at step two. Even if that case
14 were correctly decided, implementation of that framework for
15 a search warrant for a cell phone is inconceivable. Because
16 I could go to Google potentially and say, "You know what? I
17 only have probable cause to seize the text messages and
18 let's say the Google Map information that you guys have
19 retained. I don't have probable cause to keep anything
20 else, and maybe Google could provide me with those two
21 things."

22 But how would we do that with Mr. Lindell?
23 Presumably I would have to go to Mr. Parker and say,
24 "Mr. Parker, I have a warrant for Mr. Lindell's cell phone,
25 but could you please provide to me all of the messages that

1 are on there that I have probable cause for, as well as his
2 location history? And I'll just take your word for it that
3 that's responsive to the warrant." It's impossible to
4 implement that framework for a search warrant for a cell
5 phone. And so even if Your Honor were inclined to accept
6 that **Moulder** is good law, which we strongly believe that it
7 is not in light of **Dalia**, in light of the **Cartier** case that
8 I just cited to Your Honor, in light of the fact that the
9 D.D.C. cases that it rests on have been determined to be bad
10 law even in D.D.C., it wouldn't matter, because that
11 framework is incompatible with the search of a physical cell
12 phone from an individual.

13 In terms of the repeated citations to **Riley** and
14 **Carpenter**, the Supreme Court decisions that highlight the --
15 how phones are private, how phones contain a lot of private
16 information, we don't deny that, Your Honor. I have two
17 cell phones here and it's true that they contain a
18 significant amount of private information, not unlike
19 Mr. Lindell's phone, I'm sure. It contains a lot of private
20 information, because like anybody else, the phone contains
21 medical information. It contains information about -- you
22 know, about my relationships with other people, and it is a
23 private entity.

24 We respected his rights by getting this search
25 warrant. That is what **Riley** and what **Carpenter** call for.

1 **Riley** says you can't seize -- you can't search a phone
2 incident to arrest. You've got to get a warrant. **Carpenter**
3 says you can't take historical cell site information without
4 a warrant. We got a warrant. That's what the Supreme Court
5 wanted us to do to protect individuals' privacy. We
6 recognized that the phone is a -- is special and we
7 appreciated that in obtaining the warrant from Judge Leung.

8 As far as the -- and so that was -- to be clear,
9 Your Honor, I'm still walking through the counts. That was
10 Count 3.

11 Count 4 is Mr. Lindell's allegation that he was
12 unlawfully seized and that agents did not use the least
13 intrusive means to seize him.

14 Mr. Lindell on the recording that Your Honor
15 heard -- or I'm not sure whether you've listened to it, but
16 we've cited the specific language on there.

17 THE COURT: Your description of it.

18 MR. JACOBSON: He says he's not under arrest. He
19 says he's not under arrest. He asked to be put under
20 arrest, "Arrest me. The agents wouldn't arrest me." So I'm
21 not sure how he can claim he's unlawfully seized, or how
22 Your Honor could determine on the basis of the record that
23 you have in front of you today, how there is a likelihood of
24 success on an unreasonable detention claim that in any event
25 wasn't briefed in the opening brief.

3 MR. JACOBSON: I'm sorry. I'm sorry.

4 On Count 5, Your Honor, the due process claim, the
5 key argument that was briefed there was that we had withheld
6 material information from Judge Leung and that that was a
7 substantive due process violation. There is no substantive
8 due process violation arising from withholding information
9 in -- perhaps there's some universe where that could arise,
10 but ultimately that's a Fourth Amendment issue. And it's
11 been packaged here I think in paragraph 79 of the Complaint
12 as a Due Process Clause issue, and now on reply we're
13 hearing from the plaintiffs: No, you've misunderstood us.
14 It's a Fourth Amendment argument.

15 But there's nothing that we can do -- we didn't
16 package the Complaint the way that Mr. Lindell packaged the
17 Complaint. We didn't choose how to package the Complaint.
18 He packages it as a substantive due process violation, but
19 ultimately it doesn't matter. Because even if it's a Fourth
20 Amendment claim, and even if Your Honor were to essentially
21 construe the Complaint the way you would construe a *pro se*
22 complaint and give it some kind of special treatment,
23 there's no Fourth Amendment violation here. Because the
24 contention is that the specific information that he's
25 alleging we withheld, even if we withheld it, there's no

1 ability to meet the **Franks** standard in that context.

2 There's two -- the **Z.J.** case that the plaintiffs
3 cite articulates the standard for what you need to do to
4 establish a **Franks** violation based on the withholding of
5 material information in a search warrant affidavit. The
6 facts have to be omitted with the intent to make or in
7 reckless disregard of whether they thereby make the
8 affidavit misleading, and the affidavit if supplemented by
9 the omitted information could not support a finding of
10 probable cause.

11 This Court can determine for itself and I don't
12 think I need to stand here and really argue that we ought to
13 have told Judge Leung that we had -- that the entire
14 Department of Justice had a conflict of interest and could
15 not investigate Mr. Lindell, and if only we had told Judge
16 Leung that he would have never issued this warrant.

17 So, Your Honor, there's no likelihood of success,
18 whether you package it under the substantive due process
19 framework under Count 5, or whether you construe it as a
20 Fourth Amendment claim.

21 I'm not going to hit on the irreparable harm and
22 public interest factors, really, because ultimately there is
23 no ability to establish irreparable harm based on the
24 arguments that Mr. Lindell has put forward, because it
25 exclusively rests on the likelihood of success on the five

1 claims. The plaintiffs' argument primarily about
2 irreparable harm, even if you construe it most favorably, is
3 that we are chilling his -- we're chilling his rights and
4 every day that we retain that phone we're chilling his
5 ability to exercise his First Amendment rights.

6 The primary citation, I think, in Plaintiffs'
7 briefing on that issue is to the **Cuomo** case, a recent
8 Supreme Court case addressing COVID restrictions on worship.
9 In the **Cuomo** case, the court determined that a restriction
10 in the state of New York that limited in some circumstances
11 church attendance to ten people or fewer, that that was
12 unconstitutional and it violated the First Amendment, and
13 that every day that the plaintiffs in that case were denied
14 their right to worship was a violation of their First
15 Amendment rights. Again, this -- circumstances here just
16 could not be more different. Nobody is barring Mr. Lindell
17 from exercising his First Amendment rights. The inability
18 to worship in your church, at your synagogue, at your
19 mosque, looks nothing like what happened to Mr. Lindell
20 here. His phone was seized. He's been talking nonstop
21 since that occurred.

22 On the public interest factor, Your Honor, the
23 public's interest is in effective law enforcement. It's in
24 prompt resolution of criminal matters.

25 And unless Your Honor has anything else on the

1 freestanding constitutional claims, I'll move quickly to
2 some of the Rule 41(g) issues.

3 THE COURT: I do not and I think that would be
4 helpful.

5 MR. JACOBSON: Okay. So, Your Honor, at the 41(g)
6 level, the court -- the Eighth Circuit has been clear -- and
7 this derives from that 1975 Fifth Circuit **Richey** case --
8 that there is equitable jurisdiction to entertain claims for
9 the return of property pre-indictment, and that's what rule
10 41(g) allows. And so we're not hiding from the fact that
11 there is a potential remedy under 41(g) for an
12 unconstitutional seizure, or for a seizure that goes on for
13 too long, or for a seizure that's otherwise in callous
14 disregard of someone's rights, but ultimately it's a
15 balancing test. And under the 1989 amendments to Rule 41,
16 they provide I think in the most clear language that where
17 the United States has a need for property in an
18 investigation or a prosecution, the retention of the
19 property is reasonable.

20 Mr. Lindell has the burden under the **Jackson** case
21 that Your Honor cited in the denial of *ex parte* relief here,
22 he has the burden to show why he's entitled to this property
23 and why the Government's interests in retaining that
24 property for purposes of its investigation are substantially
25 outweighed by his interest.

1 Under the Eighth Circuit's **Jackson** and **Fyler**
2 cases, again, I believe -- at least the **Jackson** case and the
3 **Black Hills** case were cited in Your Honor's order, but the
4 framework is clear. There's four factors that need to be
5 looked at to obtain equitable jurisdiction. There is
6 callous disregard of the individual's constitutional rights.
7 There's irreparable harm from failure to return the
8 property. There's an individual interest and need in the
9 return of the property. And there's got to be no adequate
10 remedy of law, no adequate remedy at law in absence of -- no
11 adequate remedy at law.

12 Turning first to the callous disregard factor,
13 under the **Fyler** case, the Eighth Circuit's **Fyler** case which
14 we cited repeatedly on our 41(g) briefing, getting a warrant
15 essentially means you're never going to have callous
16 disregard for the plaintiff's rights. That's not -- it's
17 not definitive in that no matter what you get a warrant, it
18 automatically means no callous disregard, but it is a
19 significant factor establishing an absence of callous
20 disregard of a plaintiff's rights.

21 The **Richey** case, again, getting back to that Fifth
22 Circuit 1975 case that established this general framework
23 and that the plaintiff cites and relies on in his reply,
24 talks about what -- it distinguishes between two
25 circumstances, one that would and one that would not

1 establish callous disregard. A factor that would establish
2 callous disregard is fraud in obtaining a warrant. A factor
3 that would not establish callous disregard is where you're
4 merely claiming that the warrant is invalid. I think it's
5 pretty clear where Mr. Lindell's claims fall on that
6 spectrum. He's challenging the warrant. He's not claiming
7 that there was fraud in obtaining the warrant.

8 Another good example comes from the **Black Hills**
9 case. In the **Black Hills** matter you had Sue, the dinosaur,
10 which is currently in my hometown in Chicago, was unearthed
11 and the Government was retaining the dinosaur in callous
12 disregard of ultimately the public's entitlement to that
13 significant archeological finding. The Government was
14 damaging the property and it's own expert, I believe, in
15 that case testified that the Government was damaging the
16 property. That's callous disregard. It's not satisfied
17 here. There is no callous disregard. And if you were to
18 embrace, Your Honor, the Eleventh Circuit's **Trump** decision,
19 callous disregard is essentially end-all and be-all for
20 purposes of establishing equitable jurisdiction here.

21 The second factor, irreparable harm, it's got to
22 be actual, it's got to be great, it's got to be imminent.
23 That's from the **Wilansky** case from this court, from the
24 District of Minnesota, and from the **Fyler** case. Stigma
25 associated with the execution of a search warrant is

1 insufficient. It's insufficient to justify -- to find
2 irreparable harm. Here, we have followed the normal warrant
3 process. We have implemented a filter protocol to protect
4 Mr. Lindell's attorney-client privilege. There is no
5 irreparable harm.

6 As far as a need for the property, the **Pieper** case
7 -- that's another Eighth Circuit decision -- provides that
8 where an individual has copies of the seized material
9 there's no need. Mr. Lindell has almost -- according to his
10 own declaration, he's got almost an exact copy of what the
11 Government took, and I've heard no reason to believe that
12 the small delta between what he has on the cloud and what
13 the Government took on the phone, which I think constitutes,
14 according to his declaration, something like six or seven
15 days' worth of data, why he needs that data within the
16 meaning of the 41(g) cases. That certainly hasn't been
17 articulated here, only the fact that there is a small gap
18 between what he's got and what we have.

19 As far as an adequate remedy, he's got
20 suppression, and ultimately under the **Fyler** case and under
21 **Wilansky**, that's a sufficient remedy. It may not be that it
22 is a sufficient remedy in every single case, but it is
23 certainly a sufficient remedy here. The **Bennett** case, the
24 Southern District of Florida case that Mr. Lindell relies on
25 in his reply, similarly concludes that suppression is an

1 adequate remedy.

2 And so, Your Honor, ultimately for the reasons --

3 I want to raise one more issue quickly, and that's this
4 issue of the special master which was raised for the first
5 time on reply. The Government had, of course, no
6 opportunity to respond to Plaintiffs' request for a special
7 master. The request for a special master appeared nowhere
8 in the reply brief. It's not in the Complaint, it's not in
9 the original motion for an injunction. We've heard nothing
10 about a special master until the reply brief a couple days
11 ago, which left the Government at a severe disadvantage to
12 litigate that issue appropriately, to appropriately respond
13 to Mr. Lindell's request for a special master. And so -- it
14 also seems to me, Your Honor, that the absence of that
15 request in the Complaint prevents Your Honor from granting
16 that relief, because relief in the preliminary injunction
17 order can't come outside of the Complaint. The Eighth
18 Circuit has held as much. And I can give a citation for
19 that if that will be helpful: 42 F.3d 470. That's the
20 **Devose** case that relief can't be granted, and it's an
21 obvious rule, but it's worth the citation because that
22 relief is clearly outside the scope of the Complaint.

23 Mr. Lindell appears to want a filter not just for
24 attorney-client privilege. I heard today and I sort of --
25 it's implied in the reply brief that he wants a filter for

1 his First Amendment protected activity. I'm not aware, Your
2 Honor, and I certainly didn't see in the briefing of any
3 authority that would call for a special master or a special
4 master to review Mr. Lindell's First Amendment right. That
5 is not a privilege in the manner that an attorney-client
6 communication is a privilege.

7 And so for that reason, for those various
8 different reasons, the appointment of a special master here
9 would be completely inappropriate. Mr. Lindell is not
10 without remedies, and so Your Honor's -- Your Honor, a
11 determination that he can't succeed on his preliminary
12 injunction or that he can't succeed on his 41(g) motion does
13 not leave him without any tools to combat what he claims is
14 unconstitutional Government behavior. Suppression he has.
15 He could potentially bring a **Bivens** action against the
16 agents. We have strong reason to believe that that action
17 would be unsuccessful, but I want to be clear that we're not
18 suggesting that Mr. Lindell has no tools in his tool belt
19 and that the law provides no tools to combat
20 unconstitutional Government behavior. Of course, there's no
21 unconstitutional Government behavior here. This is standard
22 playbook Government action here, but there are tools and I
23 think I've articulated a few of them.

24 Mr. Lindell has claimed that we ought to have cut
25 a subpoena to him before we issued the warrant. Your Honor

1 is uniquely aware more than perhaps any judge in the country
2 about what happens when subpoenas are issued for material
3 belonging to Mr. Lindell.

4 In the **Lindell vs. January 6th Committee** case,
5 which is assigned to you, Your Honor -- that's 22-CV-28 --
6 Mr. Lindell challenges the seizure -- or the January 6th
7 Committee's subpoena to obtain Verizon records. Those
8 Verizon records presumably are toll records that would just
9 say: "Call Out," "Call In." If Mr. Lindell is challenging
10 a third-party subpoena that would provide only call records,
11 it is almost inconceivable that he would respond to a
12 subpoena seeking content that was called for by this
13 warrant. Even if there were reason to believe that
14 Mr. Lindell would respond to a subpoena, would happily give
15 up all of the material that the Government asked for, it
16 wouldn't matter and it wouldn't let him obtain relief here,
17 because even in some of the cases that he's cited, courts
18 have determined that the issuance of a subpoena, along with
19 a warrant side by side, is perfectly permissible and not
20 inappropriate in any way. There's no Justice Department
21 policy that bars the issuance of -- that bars subpoenas from
22 coming alongside warrants. There are limitations in the
23 context of search warrants for attorneys and search warrants
24 for completely disinterested third parties that provide a
25 sort of presumption that the Government will try to get a

1 subpoena unless there's a unique circumstance or there's
2 reason to believe that property would be destroyed.

3 Mr. Lindell is not an attorney and he is not a disinterested
4 third party. And so even to the extent that the Justice
5 Department manual -- or that the Justice manual describes
6 circumstances where subpoenas need to come before warrants,
7 they provide no right to Mr. Lindell and they're
8 inapplicable in any event.

9 So for those reasons, Your Honor, 41(g) relief is
10 inappropriate here and there is no likelihood of success on
11 any of the claims, no irreparable harm, and the public
12 interest strongly favors permitting the investigation to
13 play out and allowing the investigation to ultimately take
14 its course consistent with the **Deaver** decision and the
15 **Younger** decision from the Supreme Court.

16 For those reasons, Your Honor, relief should be
17 denied here.

18 THE COURT: Thank you, Mr. Jacobson.

19 Mr. Parker, rebuttal?

20 Mr. Jacobson's right. You don't ask for that
21 special master in your Complaint. The reason I noticed that
22 is because the first time I saw a reference to the special
23 master request was in Mr. Dershowitz's *Wall Street Journal*
24 editorial, and I was a little surprised to see it there
25 because I didn't see it in the Complaint the day before.

1 Anyway, that's why --

2 MR. PARKER: There are a number of things we
3 didn't ask for in the Complaint that might be a good
4 resolution. Redaction I don't think we mentioned in the
5 Complaint either. I don't think it needs to be asked for in
6 the Complaint. It's one way in which we can deal with the
7 practicality that the Government might raise. Ultimately
8 they did. We responded with one way that we could do that.

9 That does not preclude this Court in its
10 conclusions determining that a special master would be the
11 appropriate way to deal with this, and it doesn't prejudice
12 the Government from making an argument about it, just like
13 they'd make an argument on redaction. What is it that, you
14 know, needs to be litigated about that?

15 The central issue is that under **Moulder** and the
16 two-step process this warrant is a general warrant and that
17 the Government is now rifling through all of the material of
18 Mr. Lindell without any sort of boundaries to it other than
19 maybe a filter team as it relates to attorney-client
20 privileged information. And the warrant that the judge
21 allowed them to gather information and look at doesn't cover
22 that material. And so it is a general warrant and there has
23 been no response to that, none. It's simply: We have a
24 right to go through personal and private information of U.S.
25 citizens even though the court did not issue a warrant for

1 us to do that, and that is a general warrant.

2 THE COURT: How about the preclusion principles
3 that I asked about earlier? Have you thought about that?

4 MR. PARKER: Yes. The cases that we cite in our
5 brief I believe deal with **Younger**. They deal with a
6 situation just like this when a warrant is unconstitutional,
7 done in bad faith. You know, the Government wants to claim
8 that there is no evidence of bad faith here. This isn't
9 like **Lewellen**, for example. Well, there is plenty evidence
10 of bad faith.

11 Mr. Lindell has been a target for some time. He's
12 been a target by political opponents who view him on one
13 side of the political spectrum and they're going after him.
14 Mr. Lindell didn't even know of Tina Peters and this
15 whole --

16 THE COURT: My question's a little different.
17 It's sort of a, one could argue, a technical procedural
18 problem, but I do have some concerns about it. You're
19 asking me to decide constitutional law questions as they
20 pertain to this warrant. Will that resolution have
21 preclusive effect in the event those questions need to be
22 revisited down the road in some other context?

23 MR. PARKER: At most in looking at Rule 65 and the
24 preliminary injunction posture that this Court sits with
25 today, the Court makes a determination --

1 THE COURT: Okay. That's a good point. We're
2 dealing with a preliminary injunction.

3 MR. PARKER: -- of likelihood of success.

4 And so it's not going to have a preclusive effect.

5 I think no matter what the Court rules, the Court should
6 make clear in its ruling that it is not intended, because I
7 think Rule 65 specifically states that the Court can make
8 that assessment and finding as a part of its ruling.

I want to go back to clarify, to the extent that it needs to be clarified, 41(g), the Government made a big point in suggesting that our Complaint was a *pro bono* Complaint, or a *pro se* Complaint. No, I don't think so. 41(g) is referenced in the Complaint. It's suggested that it isn't. That's not true. It is. It is in the Complaint. It is identified as one of the relief requests. And then a motion was brought under 41(g). As the Court identified, the foundation of the reasons for 41(g) being applicable are the constitutional violations, and 41(g) references unconstitutional conduct by the Government warrants a 41(g) remedy. And so the manner in which we have proceeded is the appropriate manner under 41(g). The Complaint meets those standards by requesting 41(g) relief and by identifying the grounds and the bases for the five counts, five different constitutional violations that occurred.

25 So that's maybe a more fulsome response to the

1 Court's previous question regarding how the procedural
2 posture of this case gets into the constitutional analyses
3 that we have been focused on here today.

14 I want to respond a few things said about the
15 First Amendment violations here and the fact that there's
16 been no callous disregard of Mr. Lindell's rights as it
17 relates to that constitutional amendment.

18 He's out there speaking and therefore he obviously
19 has not been chilled. That isn't the standard, that
20 somebody is out there speaking. The actions by the
21 Government create intimidation, intimidation for him and who
22 he associates with and for people who will not associate
23 with him.

24 And the reason is -- and I've experienced this and
25 I know this to be the case having been involved in these

1 cases, experts who say, "I've got all this info, but I won't
2 testify about it." It happens all the time. That's not the
3 way a democracy should work.

4 THE COURT: Well, we gauge chill by conduct,
5 right? That's one way we gauge it.

6 MR. PARKER: And that's what I'm speaking to.
7 People are not associating who would otherwise associate
8 with these ideas because they're afraid, because they're
9 afraid of this theory without even looking behind the
10 curtain, the theory that electronic voting machines are
11 inappropriate to be married to the vote.

12 THE COURT: Well --

13 MR. PARKER: They shouldn't be counting and
14 tabulating. And when -- I'm sorry. I don't want to
15 interrupt you.

16 THE COURT: Oh, no, it's okay, Mr. Parker. I
17 didn't mean -- you can finish your thought.

18 MR. PARKER: And there are strong political views
19 on either side, and this administration, this Justice
20 Department, as well as the FBI, but in particular the
21 Justice Department, has stated from the highest levels and
22 verbalized that those who take that position are supporting
23 domestic terrorists. Those statements have been made. And
24 it has an enormous impact on the First Amendment rights of
25 people who believe in that and who want to carry out those

1 beliefs through discourse, and that's what's happened.

2 Mr. Lindell would likely have been doing many
3 different things that he is not doing despite the fact that
4 people may believe, well, he's still being public about it.
5 He's still -- it's still a chilling effect on him, and more
6 so it is a chilling effect on his freedom of association,
7 and the manner in which this was done to Mr. Lindell and it
8 went public before he even went public underscores that
9 reality.

10 THE COURT: But then you've got to -- I mean --
11 I'm not sure what to do with all that.

12 On the one hand, a criminal investigation
13 necessarily or almost always results in chill. It isolates
14 the subject of the criminal investigation. It doesn't
15 matter whether you're a felon in possession, a drug dealer,
16 or somebody charged with some other crime. People by nature
17 then dissociate.

18 And I don't think that civic engagement insulates
19 one from proper criminal investigation. So you've got --
20 what you're articulating are grounds for a subsequent **Bivens**
21 action depending on how this all shakes out. I don't
22 understand that what you're articulating under the law is a
23 basis to get the cell phone back via a preliminary
24 injunction in this case. That's my concern.

25 How do you answer that?

1 MR. PARKER: The balancing of the equities of the
2 criminal investigation that is being done, and the import of
3 the public political issues that are being debated, and the
4 import of making sure that people are allowed to make these
5 public statements and that are not attacked criminally in
6 bad faith because they are taking those positions is really
7 what we are talking about.

1 fraud in obtaining the warrant, that word may not have been
2 used, but the failure to provide important information, that
3 argument has been made and is in fact a part of the record.

4 The argument that Mr. Lindell has the burden to
5 show why the 41(g) elements are met here, that is
6 acknowledged and we have made the arguments that are
7 necessary. They are in the construct of the constitutional
8 violations that we've talked about, but that burden has been
9 met. And if there is a finding that in fact this is a
10 general warrant in the way that it was obtained and the
11 execution of it articulated a number of violations as we've
12 already argued, then there is irreparable harm. The second
13 element is met.

14 The individual's interest. I've talked about that
15 already. Mr. Lindell has a direct interest, in fact, in
16 having not just his phone back, but more importantly his
17 information not being rummaged through by the Government and
18 that is an independent interest as well.

19 The argument that, well, this case is different
20 than **Moulder** because **Moulder** was a third-party email account
21 company, Google in that case, and they can do it, but how
22 are we supposed to do it. We can do it with cell phones and
23 there can be a process in place. And it can't just be,
24 well, we can have general warrants because we don't know how
25 to do, you know, keywords or do searching by appropriate

1 people and who's going to do it so that it passes Fourth
2 Amendment muster. Getting a warrant is not sufficient.
3 Getting a warrant with safeguards and protocols in place is
4 what is required according to **Moulder**.

5 Thank you, Your Honor.

6 THE COURT: Thank you, Mr. Parker.

7 I would note that we are six minutes over time
8 here. Mr. Jacobson, let me give you just a couple of
9 minutes if you wanted to say the last word here.

10 MR. JACOBSON: Your Honor, there's really nothing
11 further that I -- I don't want to interrupt lunch here, Your
12 Honor, so --

13 THE COURT: No, you're not interrupting lunch.

14 MR. JACOBSON: But I think it's -- I think we've
15 made the key point, and the key point is that this
16 litigation, this Complaint, is brought to enjoin a federal
17 criminal investigation, that that is inappropriate. There's
18 been no showing of any disregard for Mr. Lindell's rights.

19 THE COURT: All right. While you're there, let me
20 ask if the Government has a suggestion as to how best to
21 submit the documents *in camera*.

22 MR. JACOBSON: Your Honor, we could file a motion,
23 a limited motion that would just explain pursuant to the
24 Court's order, we are filing -- I believe it was -- this was
25 in response to Count 2 of the Complaint, correct, the count

1 involving cell site location information?

2 THE COURT: How about the application materials?

3 MR. JACOBSON: The warrant materials as well?

4 THE COURT: That as well.

5 MR. JACOBSON: Okay. This would be my proposal,

6 Your Honor:

7 I could file a motion saying pursuant to the
8 Court's directive, the Government is seeking to file two
9 documents under seal, one in response to Count 2 of the
10 Complaint and one containing all of the search warrant
11 materials.

12 And then separately I'll file two attachments, one
13 responsive to the first issue, the second containing all the
14 search warrant materials.

15 And that would be the way I would propose to do
16 it, Your Honor.

17 THE COURT: All right. And you'd be filing
18 those -- well, I'll let you figure out the mechanics of it,
19 but you'd have to file those in a way that only I can access
20 and the plaintiffs cannot.

21 MR. JACOBSON: That's right.

22 THE COURT: Yes. All right. And if it's not
23 feasible to do that through CM/ECF, a hard copy submission
24 is appropriate, but I'll let you all figure that out.

25 All right. I think that's all the questions I

1 have. Thank you.

2 MR. JACOBSON: Okay. Thank you, Your Honor.

3 THE COURT: All right. The motions have been
4 fully briefed and argued. It's under advisement. We will
5 get a decision out as promptly as we can. I appreciate
6 everyone's thorough attention to the issues and the argument
7 today and the briefing that was submitted beforehand. It's
8 helpful.

9 As I say, it's under advisement, we'll get a
10 decision out as quickly as we can, and we are adjourned.

11 Thank you, everyone.

12 (Proceedings concluded at 12:11 p.m.)

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C E R T I F I C A T E

I, **TIMOTHY J. WILLETT**, Official Court Reporter for the United States District Court, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes, taken in the aforementioned matter, to the best of my skill and ability.

/s/ Timothy J. Willette

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